In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-401

ADOLFO DE LA PARRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of willfully refusing to report for a preinduction physical examination, in violation of 50 U.S.C. App. 462(a). Sentence was suspended on the condition that he work for three years in a civilian work assignment approved by the Selective Service System. The court of appeals affirmed *per curiam* (Pet. App. A 1).

The essential facts are not in dispute. Petitioner, a member of a popular rock singing group, registered

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with his local draft board on March 13, 1968, and received a I–A classification on May 20, 1968. On June 17, 1968, he was ordered to report for a preinduction physical examination on July 1, 1968. Petitioner failed to report. On July 5, 1968, the local board received a letter from petitioner stating: "I returned home to Los Angeles this afternoon [July 1, 1968] after two months employment as a musician travelling across the United States" (SSF 17).[1] He asked to be given another opportunity to take the preinduction physical.

On August 14, 1968, petitioner was ordered to report for a physical examination on September 5, 1968. He wrote a letter to the board on August 28, 1968 (SSF 19), stating: "This is to inform you that it is totally impossible for me to report for my physical examination on September 5, 1968 as I will be departing for a tour of Europe on August 29, 1968 and will not return to the United States until the middle of October." On September 5, 1968, petitioner failed to report.

Thereafter, on September 17, 1968, petitioner was declared delinquent by the board for failing twice to report for his preinduction physical. He was ordered on October 23, 1968, to report for induction on November 12, 1968. On receiving this order, petitioner filed with his local board a claim of conscien-

[1] "SSF" references are to petitioner's Selective Service file, a copy of which is being lodged with the clerk of this court.

tious objection. His induction was postponed and he was advised, on November 22, 1968, that he could meet with the board on December 3, 1968, to discuss his claim. On November 29, 1968, the board received a letter from petitioner's wife stating that the December 3 date was inconvenient because her husband would then be "on tour out of state" (SSF 37). The personal interview was rescheduled for January 7, 1969. On January 2, 1969, the board was again advised by petitioner's wife that the date was inconvenient as her husband would then be on tour "out of the country" (SSF 42).

The local board then considered petitioner's conscientious objector claim on the basis of the information in his file; on January 8, 1969, it notified him that the board had not specifically found a change in status resulting from circumstances beyond his control and had refused to reopen (SSF 44). He was ordered to report for induction on February 11, 1969. Petitioner failed to report; a telegram received by the board on that day indicated that he was in New York and could not get a plane to Los Angeles because of the snow conditions (SSF 46).

Petitioner was declared delinquent for this failure; he was again ordered to report on July 29, 1969. On this date, he did report, but when his name was called, he refused to take the symbolic step forward.

On September 10, 1969, petitioner was indicted for refusing induction, in violation of 50 U.S.C. App.

462(a). After a non-jury trial in the United States District Court for the Central District of California, he was convicted. The court of appeals reversed on the authority of *Gutknecht* v. *United States,* 391 U.S. 395. *United States* v. *Adolfo de la Parra,* C.A. 9, No. 25047, decided September 9, 1970.

One week later, on September 16, 1970, petitioner was indicted for willfully failing to report for his preinduction physical examination on September 5, 1968. The present conviction followed and the court of appeals affirmed *per curiam* (Pet. App. A 1).

1. Petitioner contends here, as he did below, that he has been put twice in jeopardy by a prosecution for failure to report for a physical examination following the reversal of his conviction for refusal to submit to induction. We do not agree.

Under Selective Service regulations, petitioner had separate duties to report for his preinduction physical as ordered (32 C.F.R. 1628.16) and to report for induction as ordered (32 C.F.R. 1632.14). He failed to comply with either order. It is well settled that he was therefore subject to criminal prosecution for both offenses. See *McKart* v. *United States,* 395 U.S. 185, 201; *United States* v. *McGee,* 426 F. 2d 691 (C.A. 2), affirmed on separate grounds, 402 U.S. 479.

"[T]he question raised by a plea of double jeopardy is simply whether the two prosecutions relate to the same conduct." See *Sanchez* v. *United States,* 341 F. 2d 225, 227 (C.A. 9). Here, they clearly do not; peti-

tioner's refusal to report for his preinduction physical occurred more than ten months before he refused to submit to induction. He explained his conduct in the former instance as being due to the fact that he was "on tour" with his musical group; the later offense was based on his professed conscientious objector beliefs, first presented to the board after receiving a notice to report for induction. Thus, contrary to petitioner's assertion (Pet. 13–14), this case does not present the situation that troubled Mr. Justice Brennan in *Abbate* v. *United States,* 359 U.S. 187; here, the second prosecution is not "based on the same acts as the prior conviction" (359 U.S. at 201, Brennan J., concurring). Moreover, the government's proof in the prosecution for refusing to submit to induction, both as to the validity of the order to report and as to petitioner's willfulness, in no way relates to the proof necessary for conviction on the charge of refusing to report for a preinduction physical examination. Accordingly, the doctrine of collateral estoppel has no application in the present context. Compare *Ashe* v. *Swenson,* 397 U.S. 436.

2. Petitioner also asserts that the passage of two years between commission of the offense for which he was charged in the second prosecution and return of the indictment charging that offense deprived him of his right to a speedy trial and of due process of law. *United States* v. *Marion,* No. 70–19, this Term, probable jurisdiction noted, 401 U.S. 934, presents the

question whether pre-indictment delay short of the applicable statute of limitations may justify dismissal of an indictment, and, if so, what degree of prejudice must be shown. In *Marion,* however, the district court found—though we think erroneously—that the four-year delay involved there prejudiced a potential defense. Here, by contrast, petitioner makes no claim that the delay of two years prejudiced his defense of the second prosecution. Nor does he explain how the government's initial decision to prosecute him only for refusal to submit to induction placed him at any disadvantage. Rather, his position is simply that a lapse in time, without more, requires reversal of the conviction unless the prosecution comes forward to demonstrate that the lapse was innocent and harmless (Pet. 17). This bald proposition is, we submit, settled against petitioner, who must at least show some kind of prejudice in order to establish a constitutional claim.[2] See *United States* v. *Ewell,* 383 U.S. 116, 120, 122; *Dickey* v. *Florida,* 398 U.S. 30, 36–38; see also *United States ex rel. Solomon* v. *Mancusi,* 412 F. 2d 88 (C.A. 2), certiorari denied, 396 U.S. 936; *United States* v. *Parrott,* 425 F. 2d 972 (C.A. 2); *Tynan* v.

[2] Moreover, we note that petitioner did not make the constitutional arguments in the court below, but relied solely on Rule 48(b), Fed. R. Crim. P., an application of which depends entirely upon the discretion of the trial judge. Accordingly, we doubt that the constitutional issues relating to petitioner's speedy trial claim are properly before this Court on this petition. See, *e.g., Lawn* v. *United States,* 355 U.S. 339, 362 n. 16; *California* v. *Taylor,* 353 U.S. 553, 557 n. 2.

United States, 376 F. 2d 761, 762–764 (C.A.D.C.), certiorari denied, 389 U.S. 345.

Moreover, the reason for the lapse in time between offense and indictment was neither a purposeful design to weaken a defense nor negligent. Until July 29, 1969, it clearly was hoped that use of the criminal sanction would be avoided altogether by petitioner's induction. When petitioner was indicted in September 1969, the government quite properly did not bring every possible charge against petitioner. When his original conviction was overturned on the basis of *Gutknecht*, indictment for another outstanding offense was appropriate. Since petitioner has failed to show how he was at all prejudiced by the period of time that elapsed, and there was clearly no unjustifiable delay by the government, we believe it unnecessary for this Court to postpone action on this petition pending decision in *Marion*.

3. Finally, petitioner asserts that the government failed to demonstrate "culpable intent." It is, however, clear that petitioner was fully aware of the order to report for a preinduction physical examination on September 5, 1968. His letter informing the board that he could not comply because he would be "on tour" out of the country on that date (SSF 19) was written the day before he left for his trip and was not received by the board until after his departure. Motive must be separated from intent; it is clear that petitioner intentionally disobeyed the order

involved here. See *United States* v. *Moylan*, 417 F. 2d 1002 (C.A. 4).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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[3] Petitioner also raises claims of procedural irregularity concerning the denial of a hearing with respect to his post-induction-notice conscientious objector claim (but see *Ehlert* v. *United States*, 402 U.S. 99), and the board's declaration of delinquency on September 17, 1968. Whatever merit there might be to these contentions, however, they have no bearing on the present prosecution for an offense committed prior to the alleged procedural irregularities.

Nor is it relevent to this case that the board failed to consider medical information concerning an allergy that petitioner had (SSF 15), which was submitted after the mailing of the order to report for a preinduction physical examination. Even if such information would have entitled petitioner to a I-Y classification—which we doubt—he would not thereby be relieved of his duty to report as ordered on September 5, 1968. This Court pointed out in *McKart* v. *United States*, *supra*, 395 U.S. at 203, that "an invalid classification * * * would not be a defense today to a prosecution for failure to report for a pre-induction physical examination." Nor does *United States* v. *Hayden*, 445 F.2d 1365 (C.A. 9), suggest otherwise. As noted by the court below (Pet. App. A 1), the "punitive aspects" in *Hayden* are not present here.

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